NO. 46921-9-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CALVIN J. QUICHOCHO,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COURT
The Honorable Barbara Johnson, Judge
Cause No. 14-1-00672-1

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340
(360) 626-0148

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State of Washington

//

//

Federal Cases

Constitutional Provisions

Statutes

Rules

A. ASSIGNMENTS OF ERROR

01. The trial court erred in not dismissing Quichocho's two convictions for second degree assault where the offenses merged with his two convictions for first degree robbery.

02. The trial court erred in permitting Quichocho to be represented by counsel who provided ineffective assistance by apparently agreeing and/or failing to object to the admissibility of inadmissible evidence.

03. The trial court erred in imposing firearm sentencing enhancements.

04. The trial court erred in the procedure it used during jury selection that violated Quichocho's constitutional rights to a public trial and to be present for and to participate in the trial. (Quichocho adopts and incorporates by reference co-appellant English's argument)

05. The trial court erred in allowing prosecutorial misconduct during the direct examination of Lujan, its cooperating witness. (Quichocho adopts and incorporates by reference co-appellant English's argument)

06. The trial court erred in permitting Quichocho to be represented by counsel who provided ineffective assistance by failing to object to the prosecutor's misconduct in making reference to an agreement Lujan made with the State to provide truthful testimony in exchange for a reduced charge.

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Quichocho's two convictions for second degree assault merged with his two convictions for first degree robbery where the degree of robbery was increased as a result of the second degree assault? [Assignment of Error No. 1].

02. Whether Quichocho was prejudiced by his counsel's apparent agreement and/or failure to object to the admissibility of inadmissible evidence of guilt that implicated him in the charged offenses and violated his right of confrontation? [Assignment of Error No. 2].

03. Whether there was sufficient evidence to support the imposition of firearm sentencing enhancements where the State failed to prove that Quichocho or an accomplice was armed with an operational firearm? [Assignment of Error No. 3].

04. Whether the trial court erred in the procedure it used during jury selection that violated Quichocho's constitutional rights to a public trial and to be present for and to participate in the trial? (Quichocho adopts and incorporates by reference co-appellant English's argument) [Assignment of Error No. 4].

05. Whether the trial court erred in allowing prosecutorial misconduct during the direct examination of Lujan, its cooperating witness, by making reference to an agreement the witness made with the State to provide truthful testimony in exchange for a reduced charge? (Quichocho adopts and incorporates by reference co-appellant English's argument) [Assignment of Error No. 5].

06. Whether Quichocho was prejudiced by his counsel's failure to object to the prosecutor's misconduct in making reference to an agreement Lujan made with the State to provide truthful testimony in exchange for a reduced charge? [Assignment of Error No. 6].

C. STATEMENT OF THE CASE

01. Procedural Facts

Calvin J. Quichocho was charged by second amended information filed in Clark County Superior Court May 1, 2014, with two counts of robbery in the first degree, counts I-II, two counts of kidnapping in the first degree, counts III-IV, and two counts of assault in the second degree, counts V-VI, contrary to RCWs 9A.08.020(3), 9A.56.190, 9A.56.200(1)(a)(ii), 9A.40.020(1)(b), and 9A.36.021(1)(c), respectively. All six offenses further alleged commission while armed with a firearm, contrary to RCWs 9.94A.533(3) and 9.94A.825. [CP 8-10].

Subject to further evidentiary objections, Quichocho's statements to the police were ruled admissible at trial, which commenced October 13, the Honorable Barbara Johnson presiding. [RP 277; CP 111].[1] Quichocho took neither objections nor exceptions to the jury instructions. [RP 1496]. The jury returned verdicts of guilty, including enhancements, and Quichocho was sentenced within his standard range after the court found

[1] Quichocho was tried with his codefendant Brandon English.

his two assault convictions, counts V-VI, encompassed the same criminal conduct as his two robbery convictions, counts I-II, and thus did not count in determining his offender score for those convictions. [RP 1678; CP 94-104, 112-122]. Timely notice of this appeal followed. [CP 126].

02. Substantive Facts

On December 4, 2013, at approximately 5:00 in the late afternoon, police were dispatched to the scene of a reported robbery at a one-bedroom apartment in Clark County that belonged to 19-year-old Colby Haugen, who occasionally sold small amounts of marijuana to friends and acquaintances who stopped by the apartment. [RP 363-64, 404, 416, 536]. Although Haugen was at work at the time of the reported incident [RP 365], he explained that the previous night he was visited at his apartment by two friends, John Lujan and Juan Alfaro, and another person: "John and Juan came over. Juan paid me the money that he owed me. And they bought a little bit of weed, and left." [RP 371]. Haugen identified the third person as Brandon English, an African American with facial scarring. [RP 372-74].

Earlier that afternoon, 19-year-old Austin Bondy and then 17-year-old Brittany Horn were at Haugen's apartment waiting for him to come home from work. [RP 431, 433, 548, 552]. Bondy, who was there when Horn arrived at about 3:30 [RP 552-53], had spent the night and was there

the previous evening when English had stopped by with Lujan and Alfaro. [RP 434-35]. He answered a knock at the door at about 3:45 and allowed three people to enter, one of whom was Lujan, who lived in the same apartment complex and was known to Bondy and Horn. [RP 369, 436, 553-54]. The other two individuals were later identified as English and Quichocho. [RP 441, 436, 573, 575]. The three had come to buy an ounce and a half of marijuana. [RP 443]. As Bondy started to weigh the amount [RP 443], English shoved Lujan, who later admitted his complicity in the events, onto the couch while Quichocho, who was wearing a white or black do-rag,[2] pulled a revolver from his pocket, aimed it at Bondy and Horn, and ordered them to get on the floor, where Lujan was directed to tie their hands. [RP 437, 444, 448, 558, 560, 562-63, 565]. Bondy could see a bullet in the cylinder of the gun Quichocho was aiming at him from about eight feet [RP 445, 462], and heard Quichocho say that the "bullet was for me." [RP 445]. Bondy and Horn were moved into the bedroom closet and told to stay there for an hour. They believed they were going to die. [RP 448, 560, 566].

English and Quichocho grabbed marijuana and other items belonging to Bondy and Horn and Haugen before exiting the apartment, leaving Lujan as part of the ruse that he was not involved. [RP 367, 447,

[2] A do-rag is similar to a bandana worn around one's head. [RP 437].

563, 567]. Lujan let Bondy and Horn out of the closet before leaving several minutes later. [RP 466, 502, 576, 587].

Then 17-year-old Lujan, who initially planned the robbery with Alfaro [RP 829], admitted to talking about it with English, saying their intent was to steal the marijuana being sold at Hagen's apartment. [RP 818, 833-34]. He didn't know Quichocho, who was introduced to him the day of the incident as "Vince" from Denver, Colorado [RP 836, 838], but identified him from a photo montage. [RP 762]. When they met, Quichocho was leaning on the trunk of a gray Impala with tinted windows and a "Guam" sticker on the rear window. [RP 836-37, 872]. Lujan wasn't aware he was going to play the part of *faux* victim until English whispered to him during the robbery something to the effect of, "'Just go with this.'" [RP 839].

Haugen, Bondy and Horn delayed calling 911 due to the marijuana, but decided to report the incident, initially making no mention of the marijuana, though they revealed it later after further questioning. [RP 458-59, 576-77, 579-80].

The police interviewed Quichocho the following April 2. He denied any involvement in the robbery, claiming he had "no clue" what the police were talking about, adding he didn't know either English or Lujan. [RP 891, 894, 902, 921-22, 1169]. "I was not involved in a

robbery." [RP 910]. A cell phone was seized from Quichocho's pocket [RP 745-46, 756] and a search of his bedroom, which he shared with Tanya Cruz, produced a white do-rag. [RP 747, 765]. An Impala with tinted windows and a "Guam" sticker on the rear window was parked in the garage of Quichocho's residence, the same vehicle Lujan had identified. [RP 760-61, 795, 837].

Cruz, who was making payments on the Impala, said she did not let Quichocho use it in December 2013, which was contrary to what she had told the police when first interviewed April 2. [RP 1294, 1296-97, 1477]. The following October she told the police she had the car all day December 4. [RP 1481]. She also said the phone taken from Quichocho belonged to her, though she allowed him to use it [RP 1298], further claiming that at the time of the incident, Quichocho "did not have a phone." [RP 1312].

When questioned by the police several days after the robbery, 20-year-old English denied knowing Lujan [RP 1123, 1131, 1135], which was contradicted by the latter's relatives. [RP 712, 721, 727, 729-30, 1251]. The cell phone seized from Quichocho contained a text message sent on the day of the incident to a phone number attributed to English, which appeared on a green cell phone seized from English's residence. [RP 763, 1167-69]. The day before the incident, English had told Lujan's

younger brother A.L. that he was going to "hit a lick," which is slang for "rob," and showed him a revolver. [RP 729-30, 737]. Chris Gousse, English's 19-year-old brother, said English had called him the evening of December 4 to ask if the police were at their house. [RP 633-35, 1156].

Quichocho attended a substance abuse class the day of the incident from 1:00 to 3:00 in the afternoon, which could have ended 15 minutes early. [RP 1227-1230]. Kyle Rogers, a friend of Quichocho's, remembered dropping Quichocho off at a class early in December 2013 and then picking him up around 2:00 that afternoon and taking him back home. [RP 1273, 1276-77]. The distance between where the substance abuse class was held and the scene of the robbery was 4.9 miles, an approximate 12-minute drive. [RP 1479].

Dr. Daniel Reisberg, who specializes in memory research, which includes eye-witness identification [RP 1413], testified how the formation of memory is affected by the length of observation, the stress involved, the lighting, the time between observation and reporting, the impact of the interim viewing of pictures of a person later identified, the troubling aspects of in-court identification and the error rate (approximately 50 percent) of cross-race identification of a Caucasian identifying an African-American or the other way around. [RP 1421, 1428-1434, 1455]. He also

testified that scientific evidence makes it clear that eye witness identifications are correct more often than not. [RP 1459-60].

D. ARGUMENT

01. QUICHOCHO'S TWO CONVICTIONS FOR SECOND DEGREE ASSAULT, COUNTS V-VI, MERGE WITH HIS TWO CONVICTIONS FOR FIRST DEGREE ROBBERY, COUNTS I-II.

While the State may bring multiple charges arising from the same criminal conduct in a single proceeding, State v. Kier, 164 Wn.2d 798, 803, 194 P.3d 212 (2008), article I, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person shall twice be put in jeopardy for the same offense. If double jeopardy results from a conviction for more than one crime, the remedy is dismissal of the lesser offense. State v. Weber, 159 Wn.2d 252, 265, 149 P.3d 646 (2006). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226, reviewed denied, 143 Wn.2d 1009 (2001) (citing RAP 2.5(a) and State v. Adel, 136 Wn.2d 629, 631, 965 P.2d 1072 (1998).

Merger is a doctrine of statutory interpretation used to determine whether there is evidence that the Legislature intended to impose multiple

punishments for a single act that violates several statutory provisions. State v. Calle, 125 Wn.2d 769, 778, 888 P.2d 155 (1995). The doctrine applies

> where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accomplished by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

State v. Freeman, 153 Wn.2d 765, 777-78, 108 P.3d 753 (2005) (quoting State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983)). Whether the merger doctrine implicates double jeopardy is a question of law, which this court reviews de novo. State v. Williams, 131 Wn. App. 488, 498, 128 P.3d 98 (2006).

A person is guilty of robbery in the first degree if, during the commission of the offense, he or she displays what appears to be a firearm or other deadly weapon, RCW 9A.56.200(1)(a)(ii). Robbery in the second degree is any other robbery. RCW 9A.56.210. Assault in the second degree includes an assault with a deadly weapon. RCW 9A.36.021(1)(c). Thus, when a person is charged with robbery in the first degree for being armed with or use of a deadly weapon, the degree of robbery is increased as a result of a second degree assault. That is what happened in this case.

Quichocho was charged with two counts of robbery in the first degree, counts I-II, under RCW 9A.56.200(1)(a)(ii). [CP 8-9]. Jury

Instructions 13 and 14, the to-convict instructions for the two counts, each incorporated the language of the statute:

> (5) That in the commission of these acts or in the immediate flight therefrom the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon....

[CP 29-30].

Quichocho was also charged with two counts of assault in the second degree, counts V-VI, under RCW 9A.36.021(1)(c). [CP 9-10]. Jury Instructions 26 and 27, the to-convict instructions for the two counts, each incorporated the language of the statute:

> (1) That on or about December 4, 2013, the defendant or an accomplice assaulted (victim for respective count) with a deadly weapon....

[CP 42-43].

Austin Bondy and Brittany Horn were assaulted in furtherance of the robberies. As charged and instructed in this case, without the assault convictions, the State could only have proved second degree robbery. Washington courts have consistently held that the Legislature did not intend to punish first degree robbery separately from second degree assault, at least when the assault facilitates the robbery, as happened here. In re Pers. Restraint of Francis, 70 Wn.2d 517, 242 P.3d 866 (2019); State v. Kier,

supra; State v. Freeman, supra; State v. Chesnokov, 175 Wn. App. 345, 305 P.3d 1103 (2013).

The State relied upon Quichocho's assaults of Bondy and Horn to obtain the two convictions for first degree robbery of the same individuals, with the result that the two convictions for second degree assault merged into the two convictions for first degree robbery. This court should vacate Quichocho's two convictions for second degree assault and remand for resentencing. State v. Hughes, 166 Wn.2d 675, 686 n.13, 212 P.3d 558 (2009) (usual remedy for double jeopardy violation is to vacate the lesser offense).

02. QUICHOCHO WAS PREJUDICED BY HIS COUNSEL'S APPARENT AGREEMENT AND/OR FAILURE TO OBJECT TO THE ADMISSIBILITY OF INADMISSIBLE EVIDENCE OF GUILT THAT IMPLICATED HIM IN THE CHARGED OFFENSES AND VIOLATED HIS RIGHT OF CONFRONTATION.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective

assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)); RAP 2.5(a)(3).

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02.1 Agreement/Failure to Object

Prior to playing the redacted version of Quichocho's April 2 interview with the police, the State and counsel for Quichocho reached agreement that the redactions proposed by defense counsel were correct. [RP 801-04]. When the CD, State's Exhibit 61, was offered into evidence and played to the jury, defense counsel offered no objection. [RP 889].

02.2 Opinion Testimony as to Veracity and Guilt

While questioning Quichocho during the interview regarding his connection, if any, to the robbery, Detective Jason Granneman told Quichocho: "And you're not helping us disprove things because tell you quite honestly man, I don't think you're being honest with us." [RP 907].

Granneman's opinion was clearly inadmissible, for no witness may offer opinion testimony regarding the veracity or lack thereof of a witness because it unfairly prejudices the defendant by invading the jury province. See State v. King, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). Washington cases have held that "weighing the credibility of a witness is the province of the jury and have not allowed witnesses to express their opinions on whether or not another witness is telling the truth." State v. Casenda-Perez, 61 Wn. App. 354, 360, review denied, 118 Wn.2d 1007 (1991). A

law enforcement officer's opinion testimony may be especially prejudicial because it can have "a special aura of reliability." State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Concomitantly, a witness may not testify to his or her opinion as to the guilt of a criminal defendant, whether by direct statement or inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1997). Such testimony violates the defendant's constitutional right to have the jury make an independent evaluation of the facts. State v. Wilber, 55 Wn. App. 294, 297, 777 P.2d 36 (1989).

Granneman's statement was nothing short of a direct attack on Quichocho's veracity, giving seed to the inference that he was guilty. At that point in the interview, Quichocho had already denied any involvement in the incident or to knowing either Lujan or English. [RP 902, 906]. The inference that flows from Granneman's opinion is unmistakable: Quichocho is dishonest, he knows Lujan and English, he is involved in the robbery.

02.3 Right of Confrontation

During the same interview, Detective Granneman told Quichocho that Brandon English knew him, adding "(W)hy does he say he knows you?" [RP 914].

In a criminal prosecution, a defendant has the right to confront the witnesses against him or her. Article I, section 22 (amend. 10) of the

Washington State Constitution; Sixth Amendment to the United States Constitution. And in Bruton v. United States, 391 U.S. 123, 126, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the Supreme Court held that this right is violated when a nontestifying codefendant's statement implicating the defendant is admitted, as happened here. English did not testify and his statement that he knew Quichocho was made available to the jury by way of Granneman's above statement, which was in violation of Quichocho's right of confrontation, given there was no opportunity to cross-examine English.

02.4 Ineffective Assistance of Counsel

The record does not and could not reveal any tactical or strategic reason why trial counsel either invited error or failed to object to the above inadmissible evidence of guilt that implicated Quichocho in the charged offenses and violated his right of confrontation. Had counsel so objected, the trial court would have granted the objection under the law argued herein.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable

probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359.

The prejudice here is self-evident and not harmless. Quichocho's entire case turned on whether the jury found his statement to police credible when he denied involvement in the events and claimed he did not know either Lujan or English. The inadmissible evidence admitted in this case (Granneman's assertion regarding his lack of honesty and English's out-of-court statement that he knew Quichocho) provided most of the evidence to discredit Quichocho, thus leaving him defenseless. Thus, within reasonable probabilities, the trial's outcome could have differed had the inadmissible evidence been excluded.

Counsel's performance was deficient, which was highly prejudicial to Quichocho, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his convictions and remand for retrial.

03. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE IMPOSITION OF THE FIREARM SENTENCING ENHANCEMENTS WHERE THE STATE FAILED TO PROVE THAT QUICHOCHO OR AN ACCOMPLICE WAS ARMED WITH AN OPERATIONAL FIREARM.

Due Process requires the State to prove beyond a

reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

A defendant is subject to a firearm sentencing enhancement under RCW 9.94A.533 if the defendant or an accomplice was armed with a firearm during the commission of the underlying offense. The State must prove each element of the enhancement beyond a reasonable doubt. State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995).

As instructed in this case, for sentencing enhancement purposes, a firearm "is a weapon or device from which a projectile may be fired by an explosive such as gunpowder." [Instruction No. 30; CP 47]. See State v Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) ("a jury must be presented with sufficient evidence to find a firearm operable … in order to uphold the enhancement"). This is in contrast, say, to the substantive offense of first degree robbery, which requires only that "the defendant or an accomplice displayed what appeared to be a firearm…." [Jury Instructions 13-14; CP 29-30].

As recently as 2010, this court held that where a firearm, as here, was not presented as evidence, there must be "other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes." State v. Pierce, 155 Wn. App. 701, 714 n.11, 230 P.3d 237 (2010).

No firearm was presented as evidence in this case and operability cannot be inferred from the testimony. Given no weapon was fired, no gunshots were heard and no bullets recovered. Moreover, neither Bondy nor Horn were very familiar with guns [RP 444, 561] and were not qualified to establish that the gun was real. See State v. Goforth, 33 Wn. App. 405, 410-12, 655 P.2d 714 (1982) (evidence was sufficient to establish operability where witnesses who were familiar with shotguns testified that defendant used a real shotgun); see also State v. McKee, 141

Wn. App. 22, 31, 167 P.3d 575 (2007) (evidence of firearm enhancement sufficient given victim's description of weight and feel of gun, manner in which it was wielded, and evidence that defendant had access to other guns).

As in Pierce, each firearm enhancement must be stricken and the case remanded for resentencing.

04. QUICHOCHO ADOPTS AND INCORPORATES BY REFERENCE THE ARGUMENT OF CO-APPELLANT ENGLISH THAT THE PROCEDURE USED BY THE TRIAL COURT DURING JURY SELECTION VIOLATED QUICHOCHO'S CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL AND TO BE PRESENT FOR AND TO PARTICIPATE IN THE TRIAL.

RAP 10.1(g) provides:

> Briefs in Consolidated Cases and in Cases Involving Multiple Parties. In cases consolidated for the purpose of review and in a case with more than one party to a side, a party may (1) join with one or more of the other parties in a single brief, or (2) file a separate brief and adopt by reference any part of the brief of another.

[Emphasis added].

Pursuant to this rule, Quichocho adopts and incorporates by reference co-appellant English's argument that the trial court erred in the procedure it used during jury selection that violated Quichocho's constitutional rights to a public trial and to be present for and to participate in the trial, as specifically set forth in English's Argument 1.

05. QUICHOCHO ADOPTS AND INCORPORATES BY REFERENCE THE ARGUMENT OF CO-APPELLANT ENGLISH THAT THE STATE COMMITTED MISCONDUCT DURING DIRECT EXAMINATION OF LUJAN, ITS COOPERATING WITNESS, BY MAKING REFERENCE TO AN AGREEMENT THE WITNESS MADE WITH THE STATE TO PROVIDE TRUTHFUL TESTIMONY IN EXCHANGE FOR A REDUCED CHARGE.

Also under RAP 10.1(g), Quichocho adopts and incorporates by reference co-appellant English's argument that the State committed prosecutorial misconduct during direct examination of Lujan, its cooperating witness, by making reference to an agreement the witness made with the State to provide truthful testimony in exchange for a reduced charge, as specifically set forth in English's Argument 2.

06. QUICHOCHO WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S MISCONDUCT IN MAKING REFERENCE TO AN AGREEMENT LUJAN MADE WITH THE STATE TO PROVIDE TRUTHFUL TESTIMONY IN EXCHANGE FOR A REDUCED CHARGE.[3]

In the event this court finds that the issue relating to prosecutor's misconduct was waived, this court should nevertheless reverse based on counsel's ineffective assistance in failing to object to the

[3] For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier herein is hereby incorporated by reference.

prosecutor's misconduct in eliciting reference to Lujan's agreement with the State to testify truthfully in exchange for a reduced charge.

The record does not reveal any tactical or strategic reason why trial counsel allowed the prosecutor to present this testimony, which was harmful to Quichocho and clearly inadmissible, especially since Lujan's testimony was of critical importance to the State's argument that Quichocho was involved in the robbery. Without it, the remaining evidence did not sufficiently link Quichocho to the robbery, with the result that there is a reasonable probability that the outcome of the trial would have differed had the improper vouching been excluded.

E. CONCLUSION

Based on the above, Quichocho respectfully requests this court to reverse his convictions and remand for new trial and/or to remand for resentencing consistent with the arguments presented herein.

DATED this 18th day of August 2015.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Anne M. Cruser Prosecutor@Clark.wa.gov	Calvin J. Quichocho #359459 W.S.P. 1313 North 13th Avenue Walla Walla, WA 99362-8817

DATED this 18th day of August 2015.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

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